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### Civil Service Appointments and Promotions

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Hill: Merlino v Schneider  
**CIVIL SERVICE APPOINTMENTS AND  
PROMOTIONS**

*N.Y. CONST. art. V, § 6:*

*Appointments and promotions in the civil service of  
the state and all of the civil divisions thereof, including cities and  
villages, shall be made according to merit and fitness to be  
ascertained, as far as practicable, by examination which, as far as  
practicable, shall be competitive . . . .*

**COURT OF APPEALS**

Merlino v. Schneider<sup>1</sup>  
(decided June 8, 1999)

Petitioner, Carmen Merlino, failed to pass the second component, an oral Spanish proficiency examination<sup>2</sup> of an open, competitive civil service examination. Petitioner claimed that the oral language proficiency exam did not meet the requirements of article V, § 6 of the New York State Constitution.<sup>3</sup> The Supreme Court held that the oral proficiency exam was not administered in an arbitrary, capricious or unreasonable manner and therefore dismissed the petition.<sup>4</sup> Merlino appealed, and the Appellate Division reversed the decision of the lower court.<sup>5</sup> The Court of Appeals reversed the decision of the Appellate Division and held that as long as the test was “competitive” in a constitutional context, and reasonable in testing for the skills identified for the

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<sup>1</sup> 93 N.Y.2d 477, 693 N.Y.S.2d 71, 715 N.E.2d 99 (1999).

<sup>2</sup> *Merlino v. Schneider*, 93 N.Y.2d at 480, 715 N.E.2d at 100, 693 N.Y.S.2d at 73.

<sup>3</sup> N.Y. CONST., art. V, § 6. This Section provides in pertinent part: “Appointments and promotions in the civil service of the state and all the civil divisions thereof shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive.”

<sup>4</sup> *Merlino*, 93 N.Y.2d at 482, 715 N.E.2d at 101, 693 N.Y.S.2d at 74.

<sup>5</sup> *Id.* (citing *Merlino*, 253 A.D.2d 523, 676 N.Y.S.2d 690).

position, they would not second guess the format or the methods of the examination.<sup>6</sup>

Petitioner is an employee of the Suffolk County Department of Social Services<sup>7</sup> (hereinafter "Department"). The Department, during 1995-1996, administered a two-part, "open competitive examination" for a Spanish-speaking Probation Investigator.<sup>8</sup> In order to be certified as eligible, candidates needed to obtain a passing score on both the written multiple-choice portion of the exam and the oral Spanish exam.<sup>9</sup>

The first portion of the competitive examination was the written multiple-choice exam designed to measure knowledge, skills, and abilities such as interviewing, record-keeping and establishing and maintaining working relationships with defendants and probationers.<sup>10</sup> Petitioner received a passing mark on this portion of the exam.

The second portion was an oral Spanish exam consisting of an improvised fifteen-minute conversation between the examiner and the candidate.<sup>11</sup> The oral exam, which was designed to evaluate a candidate's Spanish conversational skills, was recorded on audiotape.<sup>12</sup> The oral exam purported to assess the candidates' language abilities through the use of pre-set criteria in the areas of grammar, pronunciation, and vocabulary. The examiner<sup>13</sup> justified his choice in the ratings by making specific comments about the candidate's strengths and weaknesses. In order to pass the oral portion of the exam, an overall average of seven points is necessary.<sup>14</sup> A total of nine people took the oral exam. Petitioner

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<sup>6</sup> *Merlino*, 93 N.Y.2d at 486, 715 N.E.2d at 104, 693 N.Y.S.2d at 77.

<sup>7</sup> *Merlino*, 93 N.Y.2d at 479, 715 N.E.2d at 100, 693 N.Y.S.2d at 72.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 479-480, 715 N.E.2d at 100, 693 N.Y.S.2d at 72-73.

<sup>10</sup> *Merlino*, 93 N.Y.2d at 480, 715 N.E.2d at 100, 693 N.Y.S.2d at 73.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> The examiner was a professor of Hispanic Language and Literature at The City University of New York, Queens College.

<sup>14</sup> *Merlino*, 93 N.Y.2d at 480, 715 N.E.2d at 100, 693 N.Y.S.2d at 73. A rating sheet with a scale of one to ten was used to grade the candidate in each area. A rating of seven to ten was passing. Ten was outstanding; nine was very good; eight was good; and seven was passable. Failing grades were a six which was

was one of the three candidates who failed the proficiency portion of the examination.<sup>15</sup>

Consequently, in writing, the petitioner requested a post-rating review of the oral examination from the Department.<sup>16</sup> In her request she complained the testing was conducted “under pressure.”<sup>17</sup> Petitioner questioned whether the examiner was speaking Castillian Spanish or the colloquial Spanish spoken in the area (Latin American Spanish).<sup>18</sup> The Department considered her appeal, and in writing informed petitioner that it could not identify any “manifest error in the test or in its determination, and therefore found no reason for correcting her examination score.”<sup>19</sup> Unsatisfied with the Department’s response petitioner, thereafter, requested a copy of the tape of her oral exam pursuant to the Freedom of Information Law (FOIL).<sup>20</sup>

FOIL, an article within the Public Officers Law, states that each agency shall make its records available for public inspection and copying, except that such agency may deny access to the records or portions when such records are examination questions or answers which are requested prior to final administration of such questions.<sup>21</sup> Petitioner’s request was denied by the Department on the grounds of departmental policy. The County Attorney’s office later advised petitioner by letter that the oral exam contained questions that could be used again and that this was the reason for the denial.

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rated somewhat inadequate; four was markedly inadequate; and two was wholly inadequate. *Id.*

<sup>15</sup> *Id.* at 481, 715 N.E.2d at 100, 693 N.Y.2d at 73. The examiner commented that petitioner used “very hesitant and halting Spanish,” had “few communication skills,” was “very weak” on grammar and did not use the correct Spanish. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* Castillian Spanish, according to the parties, refers to Spanish as spoken in Spain.

<sup>19</sup> *Merlino*, 93 N.Y.2d at 481, 715 N.E. at 101, 693 N.Y.S.2d at 74.

<sup>20</sup> PUB. OFF. LAW, art VI, § 87 (McKinney1988).

<sup>21</sup> PUB. OFF. LAW, art VI, § 87 (2)(h) (McKinney1988).

Petitioner commenced a CPLR Article 78 proceeding,<sup>22</sup> claiming that, pursuant to article V, § 6 of the New York State Constitution, the Spanish oral proficiency exam did not meet the requirements set forth therein.<sup>23</sup> Petitioner wanted the Department's determination to be vacated, with the result that she would be placed in the proper and correct rank on the eligibility list for permanent appointment.

The Supreme Court held that the oral proficiency exam was not administered in an arbitrary, capricious or unreasonable manner and therefore dismissed the petition.<sup>24</sup> The petitioner appealed, and the Appellate Division reversed the decision of the lower court.<sup>25</sup> The Appellate Division granted the petition to the extent of remitting the matter to the Department "for reconsideration pursuant to objective standards, so as to afford the petitioner opportunity to earn the position via a truly competitive examination."<sup>26</sup> In reaching their conclusion, the majority concluded that there was a "total absence of objective standards to govern the test."<sup>27</sup> There was no answer key for the oral examination and the Court reasoned that as a result "the examiner had unfettered discretion in grading the exam."<sup>28</sup> It was this lack of objectivity and the refusal of the Department to furnish petitioner with a copy of the tape of the examination that was to be used for administrative review, that led the Court to believe that petitioner's rights were violated as far as having her competency judged in a

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<sup>22</sup> N.Y.C.P.L.R. art. 78 (McKinney 1994), which is used to challenge action (or inaction) by agencies and officers of state and local officials.

<sup>23</sup> *Merlino*, 93 N.Y.2d at 481, 715 N.E.2d at 101, 693 N.Y.S.2d at 74. The Constitution requires that the examination be competitive as far as practicable. Some positions in the civil service may require that the person who fills them have certain qualities which cannot be measured by existing objective tests. In positions such as these, the examination should be competitive except for the testing of those qualities not measurable by objective tests.

<sup>24</sup> *Merlino v. Schneider*, 253 A.D.2d 523, 676 N.Y.S.2d 690 (N.Y. App. Div. 2d Dep't 1998).

<sup>25</sup> *Id.* at 525, 676 N.Y.S.2d at 692.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

competitive exam.<sup>29</sup> The dissenting judge argued that a court may intervene to ensure that tests are fairly administered and that promotions are awarded according to merit and fitness, but, once it is determined that the standards employed were fair and reasonable, the court's involvement ends.<sup>30</sup> The dissent noted that inasmuch as the oral examination was intended to assess a candidate's conversational Spanish skills, the exam unavoidably involved a certain measure of subjectivity.<sup>31</sup> The Court of Appeals agreed to hear the case to determine whether the exam was one that was intended to be wholly objective in nature.<sup>32</sup>

The Court of Appeals began its analysis by examining *Matter of Fink v. Finegan*<sup>33</sup> to determine the meaning of "competitive" in the context of an oral examination.<sup>34</sup> In *Fink*, the petitioner was a doctor who participated in an examination conducted by the municipal civil service commission,<sup>35</sup> that was administered to prepare an eligibility list for the positions of police surgeon, medical officer in the fire department, and medical examiner in the department of sanitation.<sup>36</sup> The examination consisted of two portions, a technical/written examination which petitioner passed and an oral examination, consisting of technical questions that were medical in nature, which petitioner failed.<sup>37</sup> He failed because, in the examiners' opinion, he lacked force and executive ability and was altogether too mild.<sup>38</sup>

In *Fink*, the court held that the examiners, in essence, employed what amounted to a non-competitive test of these qualities and eliminated the petitioner on the ground that he lacked these

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<sup>29</sup> *Merlino*, 253 A.D.2d at 525, 676 N.Y.S.2d at 692.

<sup>30</sup> *Id.*, 676 N.Y.S.2d at 692 (Thompson, J., dissenting in part).

<sup>31</sup> *Merlino*, 93 N.Y.2d at 482, 715 N.E.2d at 101, 693 N.Y.S.2d at 74 (commenting on the Appellate Division decision).

<sup>32</sup> *Id.*

<sup>33</sup> 270 N.Y. 356, 1 N.E.2d 462 (1936).

<sup>34</sup> *Merlino*, 93 N.Y.2d 477, 483, 715 N.E.2d 99, 102, 693 N.Y.S.2d 71, 75.

<sup>35</sup> *Fink v. Finegan*, 270 N.Y. 356, 359, 1 N.E.2d 462, 463.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* The examiners noted that petitioner was pleasant in manner and bearing and his comprehension was fairly quick.

<sup>38</sup> *Fink* at 359, 1 N.E.2d at 463.

qualities.<sup>39</sup> Further, the *Fink* court reasoned that the Constitution requires that the examination be competitive as far as practicable.<sup>40</sup> For a test or examination to be competitive, it must employ an objective standard or measure.<sup>41</sup> The court in *Fink*, therefore, held that “unless the commission can show that the test of force and executive ability was objective or that it properly exercised its discretion and determined that a non-competitive test was necessary and gave notice thereof, the examination of the petitioner should be re-rated or the examination set aside and a new official list established.”<sup>42</sup>

Second, the Court of Appeals examined *Matter of Sloat v. Board of Examiners*<sup>43</sup> to determine the difficulties in devising a wholly objective oral exam.<sup>44</sup> In *Sloat*, a substitute teacher passed written, practical and physical exams in order to obtain a position on the regular teaching staff.<sup>45</sup> The examination also included a ‘teaching test’ and an ‘interview test’ which Sloat was notified that she failed. Sloat then sought relief, claiming that the tests she failed were “arbitrary and capricious” and that no advance notice of the ‘objective standards’ that were required were given.<sup>46</sup> She further claimed that the tests were conducted without “proper basis for comparison and competitive rating between one applicant and another.”<sup>47</sup> Sloat relied on the opinion in *Fink*, stating “A test or

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<sup>39</sup> *Id.* at 363, 1 N.E.2d at 465. The court held that there was no criteria that executive ability and force are necessary qualities for the position nor did the announcement of the exam reveal that these qualities would be tested. Additionally, the court did find that there was no criteria that these qualities could not be measured objectively. *Id.*

<sup>40</sup> *Fink*, 270 N.Y. at 362, 1 N.E.2d at 465.

<sup>41</sup> *Id.* at 361-362, 1 N.E.2d at 465. “Where a standard or measure is wholly subjective to examiners, it differs in no respect from an uncontrolled opinion of the examiners and cannot be termed competitive. Thus, for these positions, the examination should be entirely competitive except for those qualities that cannot be measured by objective standards.” *Id.*

<sup>42</sup> *Fink*, 270 N.Y. at 364, 1 N.E.2d at 465.

<sup>43</sup> 274 N.Y. 367, 9 N.E.2d 12 (1937).

<sup>44</sup> *Merlino*, 93 N.Y.2d 477, 484, 715 N.E.2d 99, 102, 693 N.Y.S.2d 71, 75.

<sup>45</sup> *Sloat v. Board of Examiners*, 274 N.Y. 367, 369, 9 N.E.2d 12, 13 (1937).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

examination, to be competitive, must employ an objective standard or measure.<sup>48</sup>

The court in *Sloat* held that the appellant misread the opinion in *Fink* as authority. *Fink* did not stand for the proposition that it was condemning all oral examinations where the evaluation of the results must depend in greater or lesser degree upon the opinion of the examiners.<sup>49</sup> Here, the record disclosed that the examiners had based their determination upon their estimates of qualities which are reasonably clear, and affect the merit and fitness of a teacher.<sup>50</sup> "It is evident that it is not practicable to apply such tests in exactly the same form to each competitor or to make exact comparisons between them."<sup>51</sup> Where exact definition of the qualities that are essential or desirable is impossible, most of the determination must be left to the judgment of the examiner. The risk inherent in all systems of examination is that the test cannot be wholly objective, and to the extent that it is subjective, the result may depend as much upon the fitness of the examiners as upon the fitness of the candidate.<sup>52</sup> In *Sloat* there were standards for testing a teacher for distinctness of voice and for absence of speech defects. In *Fink*, for example, there were no standards for testing force or executive ability.

Here, the *Merlino* court stated that the "essence of both *Matter of Fink* and *Matter of Sloat* is that oral exams - - whether testing personality, teaching skills, language proficiency or some other

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<sup>48</sup> *Sloat*, 274 N.Y. at 370-371, 9 N.E.2d at 14 (citing *Fink v. Finggan*, 270 N.Y.356, 362, 1 N.E.2d 462, 464, "[w]here the standard or measure is wholly subjective to the examiners it differs in effect in on respect from an uncontrolled opinion of the examiners and cannot be termed competitive. . . . An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary, by other examiners of equal ability and experience.").

<sup>49</sup> *Sloat*, 274 N.Y. at 372, 9 N.E.2d at 15. What they said was oral examinations might be necessary in the selection of teachers "to appraise their voices for carrying power, distinctness and absence of speech defects." *Id.*

<sup>50</sup> *Id.* at 372, 9 N.E.2d at 15. The 'interview test' was held for that purpose and was adapted to that end. The 'teaching test,' too, was reasonably devised to permit the appraisal of the teacher's ability to maintain order in the class, enlist the interest of the students, and impart knowledge to them.

<sup>51</sup> *Id.*

<sup>52</sup> *Sloat*, 274 N.Y. at 373, 9 N.E.2d at 15.



attribute - - should employ objective standards as far as practicable.”<sup>53</sup> Where completely objective examinations are not possible, an exam should be devised in a way that demonstrates it tests merit and fitness and is not based upon the unfettered (and perhaps concealed) preferences of the examiners.<sup>54</sup> Unlike the exam that occurred in *Fink*, there were objective standards to govern the test in *Merlino*.

The standards used to evaluate the candidates in *Merlino* were abilities for which they would be tested and the substance, form and method of the oral exam were clearly delineated.<sup>55</sup> Petitioner, like the other eight candidates, was tested by a single grading system used by the same examiner.<sup>56</sup> The oral language proficiency exam given by the Department, “conformed to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary, by other examiners of equal ability and experience.”<sup>57</sup> As to petitioner’s claim that examiner was speaking Castillian Spanish as opposed to Latin American Spanish, the court found that the petitioner did not establish that the use of an examiner who spoke Castillian Spanish was an arbitrary act by the Department.<sup>58</sup>

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<sup>53</sup> *Merlino*, 93 N.Y.2d at 484, 715 N.E.2d at 102, 693 N.Y.S.2d at 75-76.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 484, 715 N.E.2d at 103, 693 N.Y.S.2d at 76. In *Fink*, the examiners disclosed only their conclusions that the candidate lacked imponderable and undefined qualities. *Id.*

<sup>56</sup> *Id.* Pre-existing factors were identified for evaluating the candidates’ performance. Each factor was evaluated on a scale ranging from 1 to 10 points. The examiner completed the rating sheet, which contained separate columns for each graded factor, and rated petitioner according to the scale provided by the Department. The examiner substantiated the ratings by noting specific elements that went into his evaluation.

<sup>57</sup> *Merlino*, 93 N.Y.2d 477, 485, 715 N.E.2d 99, 103, 693 N.Y.S.2d 71, 76. Petitioner herself hired another Spanish linguist to review the exam. Although the examiner reached a different conclusion, she re-tested and re-evaluated petitioner using the same standards and a similar rating sheet as that utilized by the Department.

<sup>58</sup> *Id.*, 93 N.Y.2d at 486, 715 N.E.2d at 104, 693 N.Y.S.2d at 77. As long as the test was “competitive” in a constitutional context and reasonable in testing for the skills identified for the position, the court will not second guess the format or the methods of the examination. *Id.*

Thus, the petitioner in *Merlino* had notice of the abilities for which she would be tested. She was fully aware of what would be evaluated. In *Fink*, the petitioner had no forewarning about what qualities would be tested. And in *Sloat*, the qualities tested for the position of a teacher were qualities that were necessary for that particular appointment. *Merlino*, therefore had both notice about the qualities to be tested and those qualities that were being tested were necessary for her appointment as a Spanish speaking Probation Investigator. Accordingly, the Court of Appeals reversed the order of the Appellate Division.<sup>59</sup>

As interpreted in the United States Code Service<sup>60</sup> the federal law says that “good administration warrants for open, competitive examinations for testing applicants for appointment in the competitive service.”<sup>61</sup> These examinations should be practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought.”<sup>62</sup> The written words of the statute are reflective of how the New York Court of Appeals has interpreted art. V, § 6 of the New York State Constitution. They have held in *Merlino*, *Fink*, and *Sloat* that a competitive exam has to employ objective standards as far as practicable and that where completely objective examinations are not possible, an exam should be devised in a way that demonstrates that it tests merit and fitness.<sup>63</sup>

In sum, the language in both the federal and state laws concerning the objectivity of civil service exams are closely parallel. The New York State Constitution states that the appointment shall be made according to merit and fitness and that the appointments shall be competitive as far as practicable.<sup>64</sup> The federal regulations say that the exams shall be practical in character and that the exam shall as much as possible relate to matters that test the capacity and fitness of the appointment that is sought. It is therefore required by both federal and state laws that

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<sup>59</sup> *Id.* at 486, 715 N.E.2d at 104, 693 N.Y.S.2d at 77.

<sup>60</sup> 5 U.S.C.S. §3304(a) (Lawyers Cooperative Publishing).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Merlino*, 93 N.Y.2d 477, 484, 715 N.E.2d 99, 102-103, 693 N.Y.S.2d 71, 76.

<sup>64</sup> N.Y. CONST., art. V, § 6. See *supra* note 3 and accompanying text.

civil service exams must be administered objectively whenever possible in order to assure that the exam is in compliance with both the New York State Constitution and the Federal regulations. In the case at bar, the examination for the position of Spanish speaking Probation Investigator satisfied the requirements of the New York State Constitution and would have also satisfied the requirements of the federal laws had the case been brought under those laws.

*Lisa Hill*